Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments	WC Docket No. 07-245 RM-11293 RM-11303

COMMENTS OF FIBERTECH NETWORKS, LLC AND KENTUCKY DATA LINK, INC.

March 7, 2008

SUMMARY

Fibertech Networks, LLC, ("Fibertech") and Kentucky Data Link, Inc. ("KDL") commend the Commission for opening this proceeding – which is critical to allowing consumers to receive the full benefits of a competitive market for broadband services. Technological advances have made it increasingly possible for companies other than the cable company and incumbent LECs to deliver high capacity fiber optic service to the home or office. But new entrants cannot do so without the fair and nondiscriminatory access to poles and conduits mandated by Congress in the Telecommunications Act of 1996.

Rules merely mandating nondiscrimination, while necessary, are not enough. The complaint process for enforcing general nondiscrimination requirements is expensive, cumbersome, and inherently too slow. Pole owners today can frustrate access and competition simply by slow-rolling requests and by relitigating settled issues. Fibertech and KDL have been victims of these tactics. These tactics harm consumers by blocking broadband deployments and waste Commission and party resources. The Commission needs to adopt clear rules that codify its existing rulings and that reflect best practices as adopted by the states.

Thus, Fibertech and KDL urge the Commission to codify the following standard practices for pole and conduit access:

1. Adopt a rebuttable presumption to allow use of boxing or extension arms where such a technique would avoid the need for make-ready work and where facilities on the pole are accessible by ladder or bucket truck.
2. Establish shorter survey and make-ready time periods.
3. Where pole owners cannot meet applicable make ready deadlines, allow the license applicant to either (1) hire utility-approved contractors directly or (2) use NESC-compliant temporary attachments.

4. Reaffirm by rule that attachers can install NESC-compliant drop lines to satisfy customer service orders without prior licensing or pole owner approval.
5. Require conduit owners to permit CLECs to conduct manhole surveys and record searches.
6. Cap conduit owners' fees for searches and surveys at reasonable levels.
7. Require pole and conduit owners to provide sufficiently detailed documentation for any charges to competitors based on utility costs of performing surveys or make-ready work.
8. Permit CLECs to use utility-approved contractors to work in manholes without utility supervision.
9. Require ILECs to provide CLECs with reasonable access to building-entry conduit.

Fibertech and KDL's proposals pose no threat to safety or reliability. Because Fibertech and KDL have proposed little more than codifying precedents, rules, and practices already successfully adopted by the FCC, states, and fair-minded utilities, and because those precedents, rules, and practices expressly include safety requirements, there can be no legitimate basis for opposing their adoption. Adopting rules based on existing FCC and state precedents and industry best practices will promote investment, and enable companies like Fibertech and KDL to continue to respond to the ever-growing demand for competitively-priced high-speed broadband services, without compromising safety.

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Fibertech Networks, LLC, ("Fibertech") and Kentucky Data Link, Inc. ("KDL") commend the Commission for opening this proceeding.[1] As the Commission understands, poles and conduit form the critical foundation of facilities-based wireline broadband networks. Fair and nondiscriminatory access to these facilities is therefore necessary to ensure that new entrants are able to bring their facilities-based wireline broadband services to consumers. The Commission has made advanced broadband deployment its "highest priority."[2] Adopting clear and enforceable rules to ensure that competitors and new entrants have an opportunity to build their networks fulfills this goal.

[1] *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Notice of Proposed Rulemaking, 22 FCC Rcd 20195, WC Docket No. 07-245 (2007) ("*Pole Attachment NPRM*" or "*Pole Attachment Notice*").

[2] Chairman Martin's Statement Before the Committee on Commerce, Science & Transportation, U.S. Senate, at 3 (Sept. 12, 2006), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-267390A1.pdf.

I. INTRODUCTION

In its *Notice,* the Commission asks "whether it would be appropriate to adopt specific rules regarding certain non-price terms and conditions associated with Section 224 access rights."[3] The answer is yes. Specific rules are absolutely necessary to ensure that new entrants can deploy their competitive services without facing unnecessary costs and delays imposed by their competitors, the ILECs and electric utilities that also control pole and conduit access. The Commission seeks to ensure "that [its] regulatory framework remains current and faithful to the pro-competitive market-opening provisions of the Act."[4] Constant relitigation of pole and conduit access, and the delay that entails, stymies broadband investment and deployment. Adopting rules based on existing FCC and state precedents and industry best practices – as Fibertech has long advocated[5] – will promote such investment, and enable companies like Fibertech and KDL to continue to respond to the ever-growing demand for competitively-priced high-speed broadband services.

Fibertech is a leader in designing, installing, and operating high-capacity metro fiber optic networks in the Eastern and Central United States. Fibertech currently operates networks in 22 U.S. cities and has deployed more than 4,000 route miles of fiber. Fibertech engineers diverse route "open access" networks that connect telco central offices, carrier hotels, data centers, and other traffic aggregation points, enabling numerous telecommunications and Internet service providers to offer facilities-based

[3] *Pole Attachment NPRM* ¶ 3.

[4] *Id.* ¶ 1.

[5] Petition for Rulemaking of Fibertech Networks, RM-11303 (filed Dec. 7, 2005) ("Fibertech Petition").

services. It also builds "last mile" facilities to bring all-fiber connections directly to its retail customers and to permit other telecommunications companies to serve their customers over an all-fiber network. Fibertech is focused on bringing its service to underserved mid-sized cities that lack the range of fiber services often available in major metropolitan centers. Fibertech today serves all major long distance carriers, many CLECs, and a growing list of enterprise customers. Fibertech plans to roughly double the number of markets it serves over the next five years.

In New York and Connecticut – two states that have adopted significant pole access reforms – Fibertech has been able to expand more broadly and respond more quickly to customer demand than in states that do not benefit from improved pole access practices. In those states, Fibertech has built on its established dark fiber offerings by deploying Passive Optical Network ("PON") equipment in 19 of its 22 markets and using its lit fiber to offer high speed services to carriers, enterprise customers, and other end users. Fibertech's dedicated Internet access service, for example, consists of a secure, fully interoperable, and scalable suite of connections, delivered via TDM or Ethernet, offering customers access at speeds from 3 to 1000 Mbps, as well as the ability to readily migrate between these service levels as their bandwidth needs change. Because Fibertech's customers increasingly demand lit fiber services, and expect Fibertech to provide these services within weeks, not months, Fibertech's continued expansion will depend in large part on Fibertech's ability to obtain access to poles and conduit as quickly as its pole owner competitors.

KDL is a telecommunications carrier with a network consisting of more than 23,000 route miles of fiber in 23 states over which it offers its customers a wide range of

high-quality fiber-optic services. KDL focuses on serving so-called second and third tier cities that have not been the focus of incumbent fiber deployment efforts, and uses its network to connect customers to such essential facilities as tandem switches, Internet NAPs and video hubs. KDL offers services that connect businesses, schools and government agencies.

II. THE COMMISSION SHOULD CODIFY EXISTING PRECEDENTS AND BEST PRACTICES.

A. Clear and Enforceable Rules Will Encourage Deployment of Competitive Services.

Poles and conduit are classic bottleneck facilities. As the United States Supreme Court pithily stated, attachers "have found it convenient, and often essential to lease space . . . on telephone and electric utility poles. Utilities, in turn, have found it convenient to charge monopoly rents."[6] Congress has twice recognized the importance of access to poles and conduit, explicitly mandating nondiscriminatory access. In 1978, Congress enacted the Pole Attachment Act, recognizing that cable television services could not be widely deployed without reasonable access to poles and conduit, and seeking to provide cable operators with an assurance that pole access would be at just and reasonable rates, terms, and conditions.[7] In language equally applicable here, Congress found,

> Owing to a variety of factors, including environmental or zoning restrictions and the costs of erecting separate [cable] poles . . . there is often no practical alternative to a [cable] system operator except to utilize available space on existing poles. . . . Due to the local monopoly in ownership or control of poles to which cable system operators, out of necessity or business convenience, must attach their distribution facilities, it is contended that the utilities enjoy a superior

[6] *National Cable & Telecomm. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 330 (2002) ("*Gulf Power*").

[7] P.L. 95-234, § 6, 92 Stat. 33, 35 (1978).

> bargaining position over [cable] systems in negotiating the rates, terms and conditions for pole attachments.[8]

The Telecommunications Act of 1996 ("the 1996 Act") extended this access to telecommunications carriers, again demonstrating Congress's commitment to nondiscriminatory access.[9]

Simply put, without poles or conduit, companies like Fibertech and KDL cannot deploy their networks and offer service. These facilities are often under the control of the incumbents with which Fibertech and KDL compete (including electric utilities, which compete (or plan to compete) by providing dark fiber or broadband over power-line ("BPL") service). Because incumbents have strong and unmistakable incentives to limit access to these critical network building blocks, clear and enforceable rules are essential to enable competitors to benefit from the nondiscriminatory access to poles that Congress has mandated.[10]

As Chairman Martin has emphasized, the Commission "has worked hard to create a regulatory environment that promotes broadband deployment."[11] It has "removed legacy regulations . . . that discourage carriers from investing in their broadband networks," and "worked to create a regulatory level playing-field among broadband platforms."[12] In his statement in support of the *Pole Attachment Notice*, Chairman

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[8] S. Rep. 95-580 at 13, 1978 U.S. Code Cong. & Admin. News 109, 121 (1977).

[9] Telecommunications Act of 1996, Pub. L. 104-104, § 703, 110 Stat. 56 (1996).

[10] 47 U.S.C. § 224.

[11] Chairman Martin's Statement Before the Committee on Energy and Commerce, U.S. House of Representatives, at 3 (March 14, 2007), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-271486A1.pdf.

[12] *Id.*

Martin reiterated this commitment.[13] In recent years, the Commission has implemented this policy by addressing the classification of video services in a manner that removes "barriers to infrastructure investment,"[14] and promotes "the congressional goal of encouraging broadband deployment."[15] The Commission's regulatory approach to wireless broadband internet access service similarly reflects the Commission's "goal of ubiquitous availability of broadband to all Americans."[16] The Commission has since extended this approach to BPL Internet access services,[17] with Chairman Martin emphasizing that Commission action to foster development of these services is "critical" and affirming the importance of treating providers "of the same service . . . in the same manner regardless of the technology that they employ."[18] Adopting fair and easily administered pole access rules is the logical next step in the Commission's continuing effort to ensure that investment and fair competition can flourish.

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[13] "The Commission will continue to look for ways to remove barriers to competition across all platforms." *Pole Attachment NPRM*, Statement of Chairman Kevin J. Martin.

[14] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5103 (¶ 4) (2007).

[15] *Id.* ¶ 3. As the Commission is well aware, Section 706 of the Telecommunications Act directs the Commission to encourage the deployment of advanced telecommunications to all Americans. *See* Pub. L. 104-104, Title VIII, § 706 (Feb. 8, 1996) (codified at note to 47 U.S.C. § 157).

[16] *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, 5902 (¶ 2) (2007) ("*Wireless Broadband Order"*).

[17] *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, Memorandum Opinion and Order, 21 FCC Rcd 13281 (2006).

[18] *Id.*, Statement of Chairman Kevin J. Martin.

The record already before the Commission demonstrates the competitive harm that pole owner competitors can impose under the existing pole attachment regime.[19] Pole owners routinely administer poles in a manner that adds unnecessary time and expense to network deployment.[20]

Pole owners, for example, consistently disregard the Commission's long-standing 45 day deadline for either issuing licenses or providing make-ready estimates.[21] And, once issued, the make-ready estimates typically require unnecessary and time-consuming work, improperly impose the entire cost of the work on the license applicant even when the owners use some or most of the newly created space, and are based on frequently unexplained and very high labor or material rates. Such excessive make-ready estimates force the license applicant to choose between suffering competitive disadvantage by succumbing to the money demand or suffering competitive disadvantage by refusing to make the payment and thereby triggering a utility refusal to continue the pole or conduit licensing process. Pole owners often impose delay and cost by prohibiting license applicants from using boxing or extension arms, even though ILECs have been entirely free to use either technique to avoid make-ready work and have done so with great frequency. A survey conducted for Fibertech of 60 miles of poles in Massachusetts, for example, showed that the ILEC had boxed 27% of the poles, even though the ILEC

[19] *See, e.g.*, Fibertech Petition at 11-12; Reply Comments of Fibertech Networks at 6-7, RM-11303 (filed March 1, 2006) ("Fibertech Reply Comments"); ("Fibertech Reply Comments); Letter from John T. Nakahata, Counsel to Fibertech Networks, LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission, at 6-7, RM-11303 (filed Oct. 22, 2007) ("Fibertech Oct. 22, 2007 Ex Parte").

[20] *See* Fibertech Petition, Exhibit 1, Declaration of Charles Stockdale at 6-7 ("Stockdale Decl.").

[21] 47 C.F.R. § 1.1403(b).

typically is able to add facilities without boxing by overlashing its existing support strands. Pole owners' willingness to use their control over the poles to control competition is exemplified by one ILEC's citing Fibertech's request to the Commission for regulatory relief as a reason for delaying action on Fibertech's application for a manhole survey necessary for conduit access.[22]

The FCC's current rules require that a utility grant access to poles and conduit within 45 days of a request for access and that make-ready work be completed within timeframes that are both nondiscriminatory and reasonable. KDL can list numerous occasions, however, where a utility has taken an inordinate amount of time to conduct a survey for space availability. Moreover, after such waiting periods, KDL must pay for make-ready work in advance and continue to wait for the actual make-ready work to be completed. Several KDL applications have been pending for more than a year. Fibertech and KDL's experience is that ILECs act much more quickly when installing their own facilities, thereby achieving an unfair advantage in the competition to sign up customers for fiber-delivered services. By failing to perform make-ready work required for competitors' attachments in a timely manner, pole owners reap an unfair advantage. To correct this, the Commission should require utilities to complete (or allow licensee-hired contractors to complete) field surveys and to identify necessary make-ready work within the timeframes proposed by Fibertech and KDL. Unreasonable delays often result in direct monetary losses in addition to lost revenue opportunities by Fibertech and KDL.

[22] Fibertech Oct. 22, 2007 Ex Parte at 5-6 (detailing Verizon email explaining that a Fibertech manhole survey would be delayed "due to the fact that Fibertech has complained to the FCC").

The complaint process is simply too costly, in both time and money, to provide an effective remedy for all ILEC and utility failures to grant reasonable access to poles. Moreover, the penalties imposed for failures to provide reasonable access are often offset by the considerable benefit to the pole owner of denying competitive entry and imposing costs on its competitor. Unless and until the enforcement process imposes certain and substantial penalties for failure to comply with access requirements, pole owners will continue to have strong incentives to use their control over the attachment process to advance their competitive interests. Given the competitive motivation that naturally drives pole owners, the Commission must limit their control over the pole attachment licensing process. Without effective regulatory or structural constraints, pole owners will remain free to obstruct competitive entry and impair the Commission's goals of increased broadband investment and deployment.

B. The Commission Should Recognize that Even Improved Access Rules are Only a Second Best Solution to the Appointment of A Neutral Third Party Administrator To Ensure Competitively Neutral and Non-Discriminatory Access to Poles and Conduits.

The most effective means of limiting pole owners' control over pole access – and the only means that will yield true competitive neutrality – is to place responsibility for pole licensing in the hands of an unbiased, third-party administrator. Such a solution is not far-fetched: it would not be necessary to deprive the ILECs and electric companies of ownership of the poles or to shift responsibility for maintenance of the pole plant in order to achieve this end. Competitive neutrality and nondiscrimination can be achieved merely by giving a neutral third party the responsibility for issuing licenses permitting attachment of facilities to poles, or occupation of conduit, while abiding by the NESC and other applicable safety codes. All parties seeking to install facilities on poles,

including the pole owners, would be subjected to the licensing process, so that competitive providers would no longer be the only parties whose success would be dictated by the relative speed of the licensing process. (Competitive providers would, however, continue to be most affected by the speed of the licensing process, because incumbents would retain the advantage of being able to install most of their new cables by overlashing.) The administrator could be funded by the parties subject to its administration, including by means of license application fees. Establishing a third party licensing administrator would not affect questions regarding rental fees.

Both precedent and sound policy support the adoption of such a structural solution, rather than a regulatory one, to ensure competitively neutral access to poles and conduit. In the numbering context, for example, the Commission has assigned administration of competitively critical processes to neutral third party administrators. The North American Numbering Plan, number portability, and thousands-block number pooling, for example, are all administered by neutral third parties that maintain the numbering databases and ensure competitive neutrality.[23] Neutral third parties have been used in other situations in which competitive interests could lead to anticompetitive discrimination. For example, in the Consent Decree approving the merger between AOL and Time Warner, the Federal Trade Commission reserved the authority to appoint a neutral third-party trustee to enter into broadband agreements on behalf of AOL-Time Warner with non-affiliated ISPs under certain conditions, if the merged entity failed to do

[23] *See Telephone Number Portability*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8352, 8400-01 (1996); *Administration of the North American Numbering Plan and Toll Free Service Access Codes*, Third Report and Order, 12 FCC Rcd 23040, 23086-89 (¶¶ 92-98) (1997).

so.[24] More generally, the U.S. Department of Justice ("DOJ") has expressed its strong preference for structural, rather than conduct remedies, to reduce the anticompetitive impact of a proposed merger.[25]

The appointment of a neutral pole licensing administrator is the sole means to achieve true competitive parity in access to essential poles and conduits for the deployment of broadband facilities. Until the Commission adopts such an administrator, however, clear, rapidly enforceable rules that ensure – to the extent possible – reasonable and nondiscriminatory access to poles and conduits will be essential to allowing marketplace competition to drive broadband deployment and adoption.

C. Codifying Fibertech's Proposed Best Practices Will Not Compromise Safety.

To ensure that competitors can gain access to essential poles and conduits rapidly and in a nondiscriminatory manner, as Congress envisioned, the Commission needs to supplement its existing general rules of nondiscrimination with rules that codifying existing decisions and best practices. Clear rules will minimize the need to rely on the Commission's complaint process, avoid wasteful relitigation of the same issues, provide valuable transparency for all parties, and promote fair and evenhanded enforcement. Because Fibertech has proposed little more than codifying precedents, rules, and practices already successfully adopted by the FCC, states, and fair-minded utilities, and

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[24] *America Online, Inc. and Time Warner Inc.*, Decision and Order, Federal Trade Commission Docket No. C-3989 (April 17, 2001).

[25] *See* U.S. Department of Justice, *Antitrust Division Policy Guide to Merger Remedies*, Oct. 2004 at 8-9 (Oct. 2004). As DOJ explains, structural remedies "are relatively clean and certain, and generally avoid costly government entanglement in the market." *Id.* By contrast, conduct remedies involve substantial monitoring costs, may impede procompetitive behavior, and may prevent the regulated firm from responding efficiently to changing market conditions. *Id.*

because those precedents, rules, and practices expressly include safety requirements, there can be no legitimate basis for opposing their adoption.

Pole owners commonly raise safety as a reason for delaying pole access or imposing unnecessary costs on competitors. These safety concerns, however, are often asserted so broadly as to not reflect actual experience, and are abandoned when they no longer serve the pole owners' purposes of delaying or frustrating entry. Pole owners decrying boxing as unsafe, for example, have abandoned those objections where boxing became necessary to quickly and inexpensively deploy their own new services. As the Commission recognizes,[26] there are objective safety standards with which all in the industry routinely comply such as the National Electric Safety Code ("NESC") and the Bellcore Blue Book – Manual of Construction Procedures ("Blue Book") standards.[27] Fibertech's proposed best practices incorporate these and other objective standards, and provide a further safety net by expressly permitting pole owners to raise safety or other concerns to rebut proposed presumptions. Fibertech and KDL share the Commission's interest in protecting our critical national infrastructure by ensuring the safety and reliability of attachments,[28] and remain committed to complying with applicable safety codes and engineering standards. Because Fibertech's proposed reforms expressly

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[26] *Pole Attachment Notice* ¶ 38.

[27] Adopted by law by the majority of states and Public Service Commissions across the US, the NESC is a performance code considered to be the authoritative source on good electrical engineering practice, for over 90 years. States have also looked to the standards and guidelines set forth in the Blue Book when analyzing whether access practices are reasonable. *See, e.g., Oxford Networks f/k/a Oxford County Telephone Request for Commission Investigation into Verizon's Practices and Acts Regarding Access to Utility Poles*, Order at 14-15, Docket No. 2005-486 (Maine PUC Oct. 26, 2006) ("*Maine Order*"), *aff'd in part and modified in part* Order on Reconsideration (Maine PUC Feb. 28, 2007) ("*Maine Recon Order*").

[28] *Pole Attachment Notice* ¶ 38.

require compliance with applicable and objective safety standards, any claims that they will nonetheless compromise safety should be rejected as nothing more than anti-competitive fear mongering.[29]

D. Enforcing Access through Complaint Proceedings Slows Competition and Burdens the Commission.

The complaint process is both too expensive and too time-consuming to permit competitors effective access to poles and conduit. Complaint proceedings can take years, and cost hundreds of thousands of dollars to prosecute. In the meantime, competitors are powerless to provide their customers with requested service. Moreover, the significant costs of these proceedings render them uneconomic even in instances where a competitor is plainly entitled to access. Because access delayed is often competition denied, the complaint process is inadequate to meet the Commission's goal of increased broadband deployment.

The existing complaint process does not give competitors an effective way to enforce their right to nondiscriminatory pole and conduit access. These processes typically are initiated only after substantial delays have already been imposed, and can themselves take years to resolve. During that time, the competitor seeking attachment will have lost any prospective customer relying on the competitor's ability to deploy service in a timely manner. Moreover, adding the expense of litigating a pole attachment complaint to the expense of extending or building a network can make service over that

[29] Pole owners sometimes employ the argument, in opposing imposition of national pole attachment standards, that safety considerations vary across the country due to climatic factors such as icing and wind. These differences, they argue, require that utilities be free to establish their own "safety" standards. This argument, however overlooks the fact that the NESC is a national code because it already accounts for such regional differences, adjusting specific standards, where appropriate, to reflect the levels of icing, wind, or other relevant conditions that vary from region to region.

network simply uneconomic. Competitors can not routinely bear these costs without damaging their ability to compete. Too often, competitors are forced instead to go without contested attachments and either deploy their limited resources elsewhere or forgo facilities-based competition entirely.

The complaint process would still be available, of course, to litigate new issues. But codifying existing authority and best practices would relieve competitors and the Commission of the burden of relitigating issues that have long been settled. As Commissioner Copps notes, "relatively simple tweaks to . . . current rules could greatly assist in unleashing the deployment of competitive broadband throughout the country."[30] The public interest is not served, however, when the Commission must use its scant resources to adjudicate disputes that could and should be resolved under existing precedent. Adopting normative rules based on those decisions, by contrast, will have far greater effect on behavior at much lower cost to the Commission.

Fibertech's and KDL's proposed rules also balance pole owners' incentives to block access by granting competitors limited rights to take action when pole owners fail to comply with FCC rules. For example, rather than being forced into a complaint process by a pole owners' failure to complete make-ready work within the Commission's time frames, attachers would be free to hire utility-approved contractors to complete that work at the attacher's cost. Such limited self-executing remedies would streamline deployment of advanced fiber optic networks and relieve the Commission of much administrative oversight.

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[30] *Pole Attachment Notice*, Statement of Commissioner Michael J. Copps.

E. Fibertech's and KDL's Proposals Will Bring More Broadband to More Americans.

The benefits of the proposals set forth in these comments are not hypothetical or speculative. Fibertech's own experience demonstrates that simple, clear, and enforceable pole access rules lead to dramatic increases in the availability of competitive fiber networks. In Connecticut, where the pole owners, for reasons of their own, direct competitors to box poles, Fibertech has deployed more than 1,700 route miles of competitive fiber. In contrast, in certain neighboring states, including an FCC-regulated state, where Fibertech has facilities and would like to expand its footprint, Fibertech has deployed far fewer route miles. In none of these states have the pole owners chosen or been directed to adopt Connecticut's approach to boxing. This critical disparity has left thousands of consumers with fewer product and service choices and more limited access to advanced fiber-optic networks than their Connecticut neighbors enjoy. The Commission should take this opportunity to adopt rules – like Connecticut's presumption in favor of boxing – that will allow competitors to quickly and effectively deploy their fiber to meet consumer demand.

III. RECENT DEVELOPMENTS AND REGULATORY DECISIONS SUPPORT THE COMMISSION'S ADOPTION OF FIBERTECH'S PROPOSED ACCESS RULES.

A. The FCC Should Adopt a Rebuttable Presumption to Allow Use of Boxing or Extension Arms Where Such a Technique Would Avoid the Need for Make-Ready Work and Where Facilities on the Pole are Accessible by Ladder or Bucket Truck.

Both this Commission and State Commissions have already determined that pole owners' blanket prohibitions on attachers' use of the NESC-compliant, standard industry practices of boxing and extension arms are unreasonably discriminatory. The FCC should codify that conclusion and adopt a rule that the use of NESC-compliant boxing and extension arms should be presumed reasonable, unless the pole owner can show such practice are unsafe for particular poles.

Prior to the 1996 Act, pole owners commonly found pole space for their own use by boxing poles (placing the new cable on the field side of the pole and thereby achieving separation from existing cables either horizontally or diagonally) or employing extension arms (achieving separation diagonally by moving the new cable away from the pole) where the necessary space for the new attachment was not available vertically. Cable television companies also were frequently allowed to employ these techniques. Since the passage of the 1996 Act, however, certain pole owners have prohibited their use, imposing unnecessary delays and costs on competitors seeking to deploy wireline facilities.

FCC and State Commissions have recognized the discriminatory nature of prohibitions on boxing and extension arms. The FCC recently ruled that a pole owner

that allowed boxing in its own interest, but prohibited a competitive carrier from boxing, was unreasonably discriminatory and plainly violated section 224 of the Communications Act.[31] The Commission rejected the pole owner's argument that boxing created a safety hazard, finding it "unsupported by specific facts or analysis" and "undermined by the evidence" of boxing on the owners' poles.[32]

As discussed in the Fibertech petition, others have reached the same result. Connecticut's pole owners, for example, direct new licensees to box every pole.[33] Connecticut's practice regarding boxing is in large part responsible for Fibertech's successful deployment of advanced telecommunications facilities and provision of competitive service throughout the state. The New York Public Service Commission allows boxing where (1) it would allow companies to avoid exorbitant make-ready costs; (2) the pole can be safely accessed by ladders, bucket trucks, or emergency equipment, so that worker safety is not compromised; and (3) the utility allows boxing.[34] It also allows the use of extension arms where (1) make-ready costs are otherwise exorbitant; and (2) use of the arms allows for safe and reliable attachments.[35]

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[31] *Salsgiver Communications, Inc. v. North Pittsburgh Telephone Co*., Memorandum Opinion and Order, 22 FCC Rcd 20536, 20543-44 (¶¶ 20-21) (2007).

[32] *Id.* ¶ 21; *See also Cavalier Telephone, LLC v. Virginia Electric and Power Company*, Order and Request for Information, 15 FCC Rcd 9563, 9572 (¶ 19) (2000) ("*Cavalier Telephone Order*").

[33] *See* Fibertech Petition, Exhibit 2, Connecticut Regulations ("Connecticut Regulations"). Connecticut pole owners direct attachers to install their facilities on the side of the pole away from the street and opposite the side of the pole where the ILEC and cable television company have installed their facilities.

[34] See Fibertech Petition Exhibit 3, New York Order ("*New York Order*"). To ensure the practical effectiveness of the boxing relief contemplated by the *New York Order,* Fibertech has petitioned the New York PSC for clarification that the third criterion includes instances where the utility has historically allowed boxing.

[35] *Id.* at 5-6.

Since Fibertech filed its petition, the Maine Public Utility Commission ("Maine PUC") has concluded that a pole owner's policy of prohibiting attachers from boxing poles except in the precise circumstance in which the pole owner did so was "an unreasonable act and practice and discriminatory."[36] The Maine PUC found that boxing created additional space on utility poles, was consistent with NESC and Blue Book safety standards, was widely accepted and used as an acceptable alternative, and "does not create undue safety concerns."[37] Thus, Maine ordered the relevant pole owner to permit boxing so long as it was (1) "consistent with the requirements of applicable [safety/engineering] codes" and (2) the poles could "be safely accessed by bucket trucks, ladders or emergency vehicles."[38] Similarly, the Maine PUC found that the use of extension arms "to create additional pole space and avoid make ready work is an acceptable industry practice" that should not be prohibited, but allowed so long as extension arms are employed as specified in the Blue Book.[39]

Fibertech and KDL urge regulators to follow Maine's lead (and go beyond the provisions adopted by New York's 2004 Order) and adopt a rebuttable presumption that would permit boxing or extension arms whenever these techniques would avoid make-ready work and facilities are accessible by ladder or bucket truck. Because pole-owners often relied on boxing and extension arms when deploying their own networks, denying new entrants and competitors the same opportunity when they seek to deploy facilities is necessarily discriminatory. Similarly, permitting boxing and extension arms only to

[36] *See Maine Order* at 14-15.

[37] *Id.* at 16.

[38] *Id*. at 16-17.

[39] *Id.* at 17.

avoid "exorbitant" make-ready work, while pole-owners faced no such restriction, is not competitively neutral.[40]

Pole owners argue that a prospective blanket prohibition against these practices is non-discriminatory, but that is simply not true. First, ILECs readily took advantage of boxing and extension arms during the years when they were building out their networks. As noted above, a survey of 60 route miles of pole plant in Massachusetts, where the pole owners prohibited boxing in 1997, showed that the ILEC had boxed 27% of the poles. Second, ILEC's and cable companies, which are largely ubiquitous, can readily deploy new cables simply by overlashing them to existing support strand: Only new entrants absolutely need to find new pole space. As the Maine PUC explained, the incumbent provider "has less need to box poles because it can overlash new cables onto existing ones."[41] Thus, as the Fibertech Petition explained, a prohibition on boxing and extension arms, even if applied to all pole occupants, creates a barrier to entry that discourages or prevents facilities based-competition. Third, pole owners ignore their "nondiscriminatory" prohibitions when a sufficient business reason arises: *incumbents do* box poles in circumstances where boxing will "save time and reduce costs" – the very circumstances where attachers would do so.[42]

Pole owners' claims that allowing boxing and extension arms impair safety are equally misplaced. Pole owners notably fail to support these broad-brush claims with any data showing that in those states that permit boxing and extension arms, or in those cases

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[40] This additional step also reduces the potential for disputes inherent in a rule that would require competitors to agree on what level of make-ready work is "exorbitant."

[41] *Main Order* at 16.

[42] *Id.*

where utilities themselves employ boxing or extension arms, safety has been compromised. Experience has demonstrated that categorical prohibitions of boxing and extension arms are not reasonably justified by safety considerations. Boxing and extension arms are accepted industry practices that are fully consistent with applicable safety standards. The NESC states that adjacent communications lines owned by different companies should be separated by 12 inches. This separation can be achieved vertically, horizontally, or diagonally. Boxing and extension arms create space on poles for attachments consistent with this standard. The Blue Book includes information illustrating how to box a pole and specifies conditions for extension arms (Figure 3-1; section 3.3). Fibertech's proposed access rule – which only allows attachers to employ these techniques consistently with safety standards and where the pole can be safely reached – already addresses all reasonable safety concerns.

Safety is fundamental to and inherent in Fibertech's proposals. The ability of a pole owner to rebut the presumption that boxing or an extension arm is permitted for certain poles will ensure that in the rare case where these conditions are met but the attachment may nonetheless be unsafe for particular poles in particular circumstances, pole owners can assert their safety concern, and, if the license applicant disputes the decision to require the performance of make-ready work, the parties can bring their dispute to the Commission. A narrow and carefully conditioned presumption in favor of the use of boxing or an extension arm, however, will prevent pole owners from citing safety without support or as a pretense to unilaterally deny fair pole access to competitors, and reflect that in general these practices have proved not to pose a risk to safety.

B. Establish Shorter Survey and Make-Ready Time Periods to Reflect Efficiencies Produced by Nondiscriminatory Use of Boxing and Extension Arms.

The FCC's current rules state that make-ready work must be completed within timeframes that are both nondiscriminatory and reasonable.[43] The rules specify that a utility must either grant access to poles and conduit or state why access has been denied within 45 days of a request for access.[44] Pole owners, however, often delay access by failing even to perform surveys within 45 days, and failing to complete make-ready work for many months after an attacher has paid for that work. Yet pole owners act much more quickly when installing their own facilities, thereby gaining a critical advantage in the competition to sign up customers for fiber-delivered services. To minimize this competitive advantage, pole owners should be required to complete survey and make-ready work within set timeframes that are as short as is reasonably practicable.

Again, State Commissions have similarly required pole owners to comply with reasonable timeframes for make ready work. As discussed in Fibertech's Petition, the New York PSC addressed this issue, requiring pole and conduit owners to complete field surveys within 45 days of receiving a complete application and to complete make-ready work within 45 days of payment for such work.[45] Since then, the Maine PUC has concluded that a pole owner's 180-day timeframe for the completion of make ready work, a timeframe four times greater than neighboring New York, was unreasonable.[46] Maine adopted a sliding scale for make ready work, requiring make ready work to be

[43] *See* 47 U.S.C. §§ 224(b)(1), (f)(1); 47 C.F.R. § 1.1403.

[44] This regulation is understood to require issuance of a license or, if make-ready work is required, the make-ready estimate within 45 days of the license application.

[45] *New York Order* at 3.

[46] *Maine Order* at 18.

completed within 45 days, and allowing 180 days only if more than a limited number of pole replacements is required.[47] One can expect that, in virtually all cases, Maine's 180-day make-ready deadline where more than a limited number of poles must be replaced will be of mere theoretical interest. The Maine PUC's order that boxing or extension arms be permitted will obviate the need for pole replacements in most cases. Also, just last month, the Connecticut Department of Public Utility Control ("Connecticut DPUC"), issued a Draft Decision proposing to adopt a maximum 70-day time interval for the entire licensing process, with no more than 25 days being permitted for the make ready estimate, and the remaining 45 for make ready work and the issuance of the pole attachment licenses.[48] The Connecticut DPUC's Draft Decision explained that "the past custodian pole attachment performance has been too long and not reflective of today's customer-driven telecommunications market" in which "customers (regardless of the provider) deserve the most efficient delivery of services."[49] Fibertech has asked that the Connecticut DPUC's Final Decision include a narrow exception to the 45-day make-ready period when minimal make ready work is required. Specifically, Fibertech proposes that make ready work be completed within 25 days where: (1) "the make-ready work to be performed by the Pole Owners involves four or fewer poles;" (2) "the make-ready work involves no pole replacements;" and (3) "the application does not represent the segmentation of a longer route for which the applicant is seeking licenses" (to eliminate the possibility that the license applicant might "game the system" by submitting

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[47] *Id.*

[48] *Connecticut DPUC Review of the State's Public Service Company Utility Pole Make-Ready Procedures – Phase I,* Draft Decision, Docket No. 07-02-13, at 18 (Feb. 14, 2008).

[49] *Id.*

numerous smaller applications rather than a large application in order to trigger the shorter make-ready deadline).[50]

Fibertech and KDL urge the Commission to adopt a similar approach and amend current rule 1.1403(b) to (1) shorten the time allowed for completing the process of surveying poles or conduit and determining necessary make-ready work;[51] and (2) establish reasonable time limits for completion of required make-ready work. These timeframes should reasonably reflect the level of needed work, which, as in Connecticut, will be greatly reduced by allowing nondiscriminatory use of boxing or extension arms. Specifically, Fibertech and KDL propose that the Commission adopt the timelines set forth in the Connecticut DPUC's Draft Decision, modified as Fibertech has proposed to the Connecticut DPUC:

> 25 days to issue a license or, if make-ready work is required, issue the make-ready estimate;
>
> 45 days to complete make-ready work and issue the license in most cases;
>
> 25 days to complete make-ready work and issue the license where:
> 1) the make-ready work to be performed by the pole owners involves four or fewer poles;

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[50] *See Connecticut DPUC Review of the State's Public Service Company Utility Pole Make-Ready Procedures, Written Exceptions of Fibertech Technologies Networks, L.L.C.*, Docket No. 07-02-13 (filed Feb. 28, 2008). Part of Fibertech's reasoning in requesting an alternate, shorter make-ready timeframe in Connecticut than the New York State Public Service Commission has established is that the use of boxing in Connecticut dramatically reduces the amount of make-ready work that is required. Therefore, Fibertech has argued, the full 45 days will often not be necessary and that usual deadline should not apply where the particular facts surrounding a license application indicate that all required work can be completed quickly. In issuing its Draft Decision, the Connecticut DPUC found that Fibertech's earlier-proposed deadlines allowing 7 days for issuance of a make-ready estimate and 7 days for completion of make-ready work in the case of small applications was unduly aggressive.

[51] The notification period and process set out in 47 C.F.R. § 1.1403(c) should not stand as an obstacle to the pro-competitive proposals offered by Fibertech and KDL because, in practice, there is minimal industry use of or reliance on this notification period.

2) the make-ready work involves no pole replacements; and
3) the application does not represent the segmentation of a longer route for which the applicant is seeking licenses.

These timeframes are undoubtedly appropriate. First, they provide sufficient time for the work involved in the respective tasks. Second, short timeframes are necessary to achieve a modicum of competitive neutrality, because ILECs (and electric companies installing facilities for communications purposes) do not need to wait for any license. Third, pole owners can hire contractors (for which the license applicants pay), if necessary, to complete the work within the permitted time.

While the Commission previously declined to adopt a 45-day time-frame for make-ready work that was offered as one piece of a comprehensive proposal, it recognized the "need for continued processing of pole attachment applications in an efficient and timely manner" as central to competition and indicated that it would "revisit this issue in the future" if "evidence exists that the pole attachment process is not functioning to ensure that such access is made available expeditiously."[52] That time has come. The evidence now shows that the current process does not ensure the timely survey and make-ready periods needed for expeditious access. The Commission should revisit this issue and adopt the above proposal.

[52] *Petition of Cavalier Telephone LLC Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc. and for Arbitration*, Memorandum Opinion and Order, 18 FCC Rcd 25887, 25963-66 (¶¶ 140, 143) (2003).

C. Where Pole Owners Cannot Meet Applicable Make Ready Deadlines, the FCC Should Allow the License Applicant to Either (1) Hire Utility-Approved Contractors Directly or (2) Use NESC-Compliant Temporary Attachments.

The Commission should adopt self-help safety valves to ensure efficient and effective compliance with make-ready timeframes. When pole owners miss applicable deadlines, the Commission should expressly permit attachers to do one or both of the following: (1) hire utility-approved contractors to perform field survey and/or make-ready work; and (2) use NESC-compliant temporary attachments to install facilities pending completion of survey and make-ready work. This rule will facilitate timely and non-discriminatory access while minimizing the need for regulatory oversight through the resource-intensive complaint process.

Pole and conduit owners frequently gain competitive advantage by delaying the performance of requested field surveys and make-ready work, even if that means missing clear and unambiguous deadlines. Under current rules, attachers can counter these assertions only by filing a complaint – a remedy that offers little practical relief. Even if the attacher is eventually successful in rebutting the owner's claim, it must expend considerable resources to litigate the dispute, and, more importantly, must forgo construction for the duration of the often-lengthy regulatory proceedings. Even imposing penalties on foot-dragging utilities does not protect a license applicant when the benefit the utility can secure by delaying the competitor exceeds the cost of the penalty.

Pole and conduit owners should be required to allow competitors to hire utility-approved contractors to perform field surveys, make-ready determinations, and make-ready work if the owner cannot or will not meet the relevant legal deadlines. This proposed rule is consistent with and codifies existing Commission policy. In its *Local*

Competition Order the Commission established that "[a] utility may require that individuals who will work in the proximity of electric lines have the same qualifications, in terms of training, as the utility's own workers, but the party seeking access will be able to use any individual workers who meet these criteria."[53] Thus, the Commission prohibited pole owners from requiring attaching parties to use the pole owner's workers. The Commission subsequently made clear that this policy extends to "individuals who will work attaching or making ready attachments of telecommunications or cable system facilities to utility poles."[54]

And State Commissions provide further support for Fibertech's and KDL's proposed rule. The New York PSC provides that, if a pole owner is unable to complete a pole survey or make-ready work (using its own employees or a contractor) in a timely manner, the license applicant is entitled to hire a contractor (from among a list of utility-approved contractors) to perform the survey or work.[55] And, in Illinois, a similar requirement was imposed on SBC when the Illinois Commission ruled in an arbitration proceeding that: "The delay in completing work in a reasonable time can affect [applicant's] ability to compete. … If SBC is unable to meet the requested completion

[53] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd 15499, 16083 (¶ 1182) ("*Local Competition Order*").

[54] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*; *Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, Order on Reconsideration, 14 FCC Rcd 18049, 18079 (¶ 86) (1999) (citing *Local Competition Order*, 11 FCC Rcd at 16083 (¶ 1182)).

[55] *New York Order* at 3.

date, [applicant] will have the option of performing the Make Ready Work to meet the requested completion date."[56]

The Commission should also allow competitors to use NESC-compliant temporary attachments if a utility is unable to meet the make-ready work timeline. Experience in New York has shown that attachers still face delays where contractors who are employed and "approved" by pole owners refuse to work for license applicants. To ensure that the timeframes are meaningful, therefore, competitive providers should be equipped with a second means of remedying pole-owner delays without spending the time and expense inherent in bringing a complaint. Specifically, where pole owners cannot or will not comply with make-ready deadlines, competitors should be allowed to use temporary attachments.

Recognizing that time is of the essence, State Commissions have allowed temporary attachments. The New York PSC, for example, held that "temporary attachments to poles should be used if they meet all safety requirements and if a utility is unable to meet the make-ready work timeline."[57] In New York, an attacher is required to replace a temporary attachment with a standard attachment within 30 days of the completion of all make-ready work. Similarly, the Delaware Public Service Commission ("Delaware PSC") allowed Fibertech, which had filed a complaint against a pole owner's unreasonable and discriminatory practices, to construct a temporary network on the

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[56] *Arbitration Decision, AT&T Communications of Illinois et al. Verified Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with Illinois Bell Telephone Company (SBC Illinois) Pursuant to Section 252(b) of the Telecommunications Act of 1996,* Arbitration Decision, ICC Docket 03-0239, at 110-111 (Issued Aug. 26, 2003). At that time, AT&T and SBC were competitors in the local exchange market.

[57] *New York Order* at 5.

owner's poles that was necessary to reach a customer.[58] Specifically, the Delaware PSC allowed Fibertech to use temporary attachments so long as (1) the attachments complied with NESC and other safety standards; (2) Fibertech put up a bond to cover any additional make ready costs; (3) Fibertech made or paid for necessary modifications to make temporary attachments permanent; and (4) Fibertech indemnified the pole owner with respect to the temporary network.[59]

Fibertech and KDL urge the Commission to follow New York and Delaware and allow attachers to use temporary attachments in this way. Such NESC-compliant temporary attachments do not pose safety or reliability concerns. Achieved without drilling a hole through the pole, temporary attachments are made by means of a J-hook or a lag-bolted or banded extension arm, neither of which affects the structural integrity of the pole. As a result, such attachments can be used as a temporary measure, enabling the deployment of fiber network facilities pending completion of the survey and make-ready work. The use of an extension arm allows a cable to be temporarily attached, when the pole space required for the permanent attachment is not available, by creating the necessary separation diagonally.

Such rules are required because time is of the essence in providing service to customers, and attachers should not be held hostage to pole owners' resources or schedules. Requiring pole owners to allow competitors to use contractors or temporary attachments to install their facilities in timely way is essential if unwarranted, anticompetitive delays are to be eliminated. The Commission can provide true relief and

[58] Delaware Public Service Commission Order No. 6421, Complaint Docket No. 327-04, 2004 Del. PSC Lexis 77, (May 18, 2004).

[59] *Id.*

reduce the need for regulatory intervention by adopting such rules giving attachers limited rights to remedy undue utility delays.

D. The FCC Should Reaffirm By Rule That Attachers Can Install NESC-Compliant Drop Lines to Satisfy Customer Service Orders Without Prior Licensing or Pole Owner Approval.

The FCC has already recognized the market necessity of allowing drop lines to be installed immediately upon receipt of a customer order. Most recently, the Commission held that an attacher was "entitled to make service drops on reasonable notice, and without prior approval."[60] The Commission relied on the precedent cited in Fibertech's Petition, *Mile Hi Cable Partners v. Public Service Company of Colorado*,[61] which stated that "attachments to drop poles … required notice, but not prior approval."[62] Applying that precedent, the FCC declared unreasonable an agreement that required 30 days' notice to a pole owner before installing a drop line – a requirement that would have forced the attacher "to impose a 30-day waiting period on new service requests."[63]

The ability to install service drops rapidly is critical for new entrants to be able to deliver broadband facilities and services within a competitively reasonable period of time. Customers will not wait weeks or months for service to be delivered, and are equally unwilling to tolerate open-ended delays. Pre-approval and long waiting periods

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[60] *Salsgiver*, 22 FCC Rcd at 20544 (¶ 24).

[61] *Mile Hi Cable Partners v. Public Service Company of Colorado*, Order, 15 FCC Rcd 11450, 11460-61 (¶ 19) (2000) (noting the cable operator's argument that "time constraints and the delays inherent in the application process for attachments, make it unreasonable to include drop poles in the regular applications process" and concluding that "[f]or drop poles, therefore, notification to [the pole owner] of [the attacher's] use of a drop pole is reasonable but [the attacher] need not wait for approval prior to attaching").

[62] *Id.* The Commission also clarified that this policy applies to drop *lines* not just drop *poles*. *Salsgiver*, 22 FCC Rcd at 20544 (¶ 25).

[63] *Id.*

for drops tilt the competitive field in favor of pole owner competitors, who can install drops at will.

Despite the Commission's precedent supporting installation of drop lines upon notice, but not pre-approval, and regulators' support of that practice, Fibertech has received "cease and desist" letters from pole owners in Connecticut and New York alleging that Fibertech's installation of drop lines to satisfy customer orders are illegitimate, "unauthorized" attachments and threatening to remove the drop lines. Fibertech believes that pole owners' resistance to Fibertech's employment of the traditional practice of pre-licensing installation of drop lines stems from the fact that the practice is especially valuable to Fibertech and other companies whose networks are entirely fiber-optic.[64] This enables companies like Fibertech and KDL to compete for a large class of customers not located directly on their existing networks.

Drop lines, particularly fiber optic drop lines, pose no threat to safety or reliability. Drop line attachments with only notice to the pole owners have been accepted not only because of the business necessity compelling the practice but also because of the fact that an NESC-compliant drop-line raises no safety, reliability, or engineering issues. Fiber optic drop lines are extremely lightweight, do not carry electric current, and do not require use of steel support-strand (which places stress on a pole) or through-bolts (which can affect the structural integrity of a pole). In addition, because a drop line attachment

[64] Unlike a cable company's drop line, the length of which is limited by the signal loss inherent in coaxial cable, the length of an all-fiber drop line largely is limited only by considerations relating to the physical security of the line (a drop line is less resistant to falling limbs, for example, than a line that is lashed to steel strand that has been secured to poles by through-bolts). Thus, in many cases, an all-fiber service provider can reasonably serve a customer by means of a drop line that is as long as 1,000 feet.

has no effect on the physical condition of the poles to which it is attached, it can be moved to whatever position the pole owner may dictate after the owner has inspected it.

Requiring a competitive carrier to apply for and obtain pole attachment licenses before installing a drop line necessary to satisfy a customer's request for service creates significant barriers to entry in two ways:

(1) it prevents competitors from providing timely service to customers; and

(2) it forces competitors to make unnecessary investments in facilities prior to receiving customer orders.

Unless competitors are permitted to install NESC-compliant drop lines to reach customers before receiving the associated pole attachment licenses, companies like Fibertech and KDL will be limited to deploying fiber to telephone central offices and POP's and to large, enterprise customers. Small- and medium-sized businesses and residential customers will be denied the opportunity to receive service from new, fiber-based competitors.

Accordingly, the FCC should codify, as an explicit rule, its policy of allowing pre-licensing attachment of NESC-compliant drop lines applies to fiber-optic lines used by competitive telecommunications providers to connect customers they have signed up. Under the rule, attachers would inform pole owners of any drop line installations (and the date of installation) within one week of attachment so that the owner is able to inspect the attachment and correctly bill for pole rent.

E. Conduit Owners Should Be Required To Permit CLECs To Conduct Manhole Surveys And Record Searches.

As Fibertech explained in its Petition, under current rules, conduit owners can bar CLECs from performing (or even observing) manhole surveys or record searches. Excluding CLECs from this process often produces inaccurate (or misrepresented) reports of conduit availability, needless delays, and unreasonable search and survey fees. To remedy this, CLECs should be guaranteed the right independently to examine utility conduit records (at the locations where they are maintained) and to conduct manhole inspections to confirm the accuracy of conduit records.

Conduit owners cause delay and increase costs when false reports of conduit unavailability prompt unnecessary additional applications and attendant fees. On the other hand, CLECs do not discover that certain reports of conduit availability are false until they have scheduled, deployed, and paid crews to pursue fiber deployment in non-existent conduit space, thus necessitating (and delaying) the continued search for conduit that is actually available. Verizon's actions in particular belie any claims that Fibertech's proposed rule is unnecessary. During Fibertech's 15-month effort to get access to Verizon's conduit in Buffalo, for example, on at least 14 occasions Verizon incorrectly reported, based on physical examinations of manholes, the availability of conduit.[65] Fibertech cannot know how many other times Verizon falsely reported that available conduit was unavailable.[66]

[65] *See* Stockdale Decl. ¶ 23

[66] *Id.*

In addition, Verizon has demonstrated a willingness to manipulate the make-ready process to harm a competitor. In response to a Fibertech request for a manhole survey in Albany, for instance, Verizon stated:

> Out of necessity and due to the fact that Fibertech has complained to the FCC about Verizon "delays" with regard to Pole and Conduit applications, I am now forced to strictly adhere to the critical dates on our Pole and Conduit Occupancy Agreement procedures. My required due date to you with a straightline drawing is 3/15/06 (instead of your 2/2/06 request).[67]

Unfortunately, this is not an isolated incident. Verizon's practice, although it varies over different regions, consistently precludes CLEC access to manholes.[68] In New England and Buffalo, Fibertech is allowed to attend the survey but not allowed to enter the manhole or otherwise test Verizon's report regarding availability of conduit.[69] In Pittsburgh, Fibertech is ostensibly allowed to accompany Verizon surveyors, but is generally not given sufficient notice to make accompaniment possible and, in any event, must remain outside of the manhole.[70] In Albany, Fibertech had historically been allowed to perform manhole surveys (albeit in the presence of a Verizon inspector). It is not clear what access Verizon will permit in Albany in the future, however, as the email quoted above also promises "[m]any changes."[71] Finally, even in Verizon's new

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[67] Fibertech Reply Comments, Exhibit 1, January 30, 2006 Letter from Trixie Vollenger ("Fibertech Jan. 30, 2006 Letter").

[68] *See* Fibertech Reply Comments, Exhibit 2, Supplemental Declaration of Charles Stockdale ¶ 6 ("Stockdale Supp. Decl").

[69] *See id*. Notwithstanding Ms. Harrington's Declaration, Verizon is well-aware that its current practice in New England and Buffalo does nothing to resolve the precise problem that Fibertech's proposed rule is intended to address. *See* Fibertech Reply Comments, Exhibit 5, Letters from Charles Stockdale to Verizon ("Stockdale Letters") detailing Fibertech's objections to Verizon's practice.

[70] *See* Stockdale Supp. Decl. ¶ 6.

[71] *See* Fibertech Jan. 30, 2006 Letter.

attachment agreements (discussed further below), Verizon has interpreted the provision stating that the "licensee may accompany licensor . . . [on] manholes survey" as allowing accompaniment along the route but not in the manhole. Properly understood, therefore, Verizon's conduit search and manhole survey practices do nothing to alleviate CLECs' inability to confirm the truth or falsity of Verizon's report of conduit availability – the precise problem that Fibertech's proposal seeks to remedy.

Verizon has claimed that allowing Fibertech to look at its conduit records and allowing Fibertech's Verizon-approved contractors to physically survey its manholes would reveal the identity of other conduit occupants.[72] But, as pointed out in Fibertech's Petition, aerial inspection of poles reveals the same kind of information in the analogous above-ground context.[73] Fibertech is aware of no reason that underground facilities should be treated differently. Moreover, when Fibertech's contractors enter the manholes to install Fibertech's cable, they are able to see which other companies have facilities in those holes. This strongly suggests that Verizon's true purpose in precluding applicant participation in underground field surveys is to hide from its competitors not the identity of other conduit occupants but the availability of conduit that the competitors are entitled to use.

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[72] *See* Verizon's Opposition to Fibertech's Petition for Rulemaking, RM-11303 (filed Jan. 30, 2006) ("Verizon Opposition").

[73] The delays that ensue when CLECs ask utilities to perform field surveys to enable the deployment of competitive facilities are common to both aerial and underground facilities. The provision of incorrect information regarding the availability of space in such facilities to accommodate a CLEC's cable is a problem unique to underground facilities, however, because, in contrast to pole space, which is patently observable and subject to easy check by a CLEC, the availability or unavailability of conduit space cannot be determined or confirmed without access to the relevant records and manholes. It is for this reason that Fibertech requests a rule specifically applicable to conduit that not merely entitles a CLEC to perform the survey if the ILEC fails to do so in a timely manner but gives it the right, *ab initio*, to perform the record search and physical survey.

While national security is, of course, of paramount concern, it is not at all clear how permitting the same contractors on which utilities rely to enter manholes and perform work on behalf of CLECs poses any threat to national security. Fibertech and KDL, moreover, would not object to a requirement that CLEC employees or contractors be pre-approved before having access to manholes.[74]

Allowing CLECs to conduct record searches and manhole surveys would also curb excessive charges. Even where availability reports are accurate, utility charges for conduit record searches and manhole surveys are commonly excessive. Moreover, in all its service territories in which Fibertech operates, Verizon issues an estimated charge for a record search and manhole survey that Fibertech must pay before Verizon will perform the search and survey, and Verizon reserves the right to adjust this estimated charge based on actual costs.[75] Fibertech typically has little choice other than to pay the invoice, no matter how unreasonable, because Verizon will not process the application until payment is received.[76] Verizon often follows an unreasonably high estimate with an invoice for even higher "actual" costs.[77] Fibertech has repeatedly asked for explanation and documentation of these additional charges, but Verizon rarely provides the requested support for its charges.[78] Even worse, in the former Bell Atlantic territory, Verizon has refused to process unrelated pole and conduit license applications prior to payment of the

[74] As a practical matter, because ILECs and CLECs typically use the same contractors, adopting Fibertech's proposal likely would not result in access for a large number of additional personnel.

[75] Stockdale Decl. ¶ 25.

[76] *Id.* ¶ 27.

[77] *Id.*

[78] *Id.*

additional charges.[79] When deploying their own facilities, however, ILECs typically are not subject to equivalent delays.[80]

Further, as invoices sent by Verizon after performance of the search or survey to recover additional alleged costs accumulate, CLECs become vulnerable to harsh collection actions. When Verizon refuses to explain or document unreasonable discrepancies between actual and estimated cost outside the former Bell Atlantic territory, Fibertech has withheld payment.[81] Outside of the former Bell Atlantic territory, Verizon has continued processing Fibertech's applications and large balances have accumulated.[82] In the former NYNEX territory, for example, Fibertech accumulated a balance of over $700,000, representing the difference between estimated costs and alleged higher but undocumented actual costs.[83] Although Verizon and Fibertech reached an agreement regarding those invoices, the existence of purported "debt" owed by a CLEC to an ILEC puts the CLEC in jeopardy.[84]

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[79] *Id.*

[80] Fibertech believes that Verizon has completed these steps for its own FiOS deployment more quickly than it has in response to Fibertech requests. Generally, ILECs are capable of timely completion of records searches and manhole surveys when they seek to install new facilities as part of a competitive bid. *Id.* ¶ 24.

[81] *Id.* ¶ 28.

[82] *Id.*

[83] *Id.*

[84] The nature of this risk was revealed to Fibertech, in a different context, in 2004, when Verizon threatened, absent full payment within ten days, to disconnect Fibertech's cables from Verizon's central offices for failure to pay charges imposed under Verizon's CATT tariff. By issuing bills and ignoring Fibertech requests for clarification and itemization of the charges, Verizon had calculated an outstanding balance "owed" by Fibertech of approximately $300,000. Only when Fibertech threatened to bring a complaint to this Commission did Verizon agree not to disconnect Fibertech's facilities and to discuss the nature and amounts of the charges. As the result of those discussions, Verizon conceded that it was applying its tariffed rates incorrectly and retracted over $250,000 in charges.

Many state regulators have already endorsed the approach that Fibertech has proposed. The New York PSC has declared that "[a]ttachers shall have access to conduit records, with any necessary redactions, at the Owner's office."[85] Similarly, in the Bell South Louisiana Section 271 case, this Commission stated that: "BellSouth must give competitors nondiscriminatory access to information about its facilities. Access to maps and similar records is crucial for competitors who wish to utilize BellSouth facilities."[86] This approach is also consistent with at least one ILEC's current practice, again confirming its reasonableness. AT&T, for example, in the former Ameritech territory permits CLECs to perform both conduit record searches[87] and (except in Ohio) to use AT&T-approved contractors to perform the physical manhole inspection confirming the written records.[88]

Id. ¶ 29. The ability to claim that its competitor owes it a sizable debt provides an ILEC with a potentially powerful competitive weapon, especially because actively pursuing collection at a sensitive time, such as when the competitor is seeking additional financing, could derail the competitor's business plans. The possibility that an ILEC would take such action would increase if the ILEC were not under significant regulatory scrutiny at the time or if it were experiencing significant competitive pressure from the competitor.

[85] *New York Order* at Appendix A. at 11.

[86] *Application of BellSouth Corporation, BellSouth Telecommunications Inc., and BellSouth Long Distance, Inc., for Provision of In-Region InterLATA Services in Louisiana*, Memorandum Opinion and Order, 13 FCC Rcd 20599, 20710 (¶ 180) (1998).

[87] *See* Exhibit A, AT&T Form RC-1 & C-1 ("AT&T Form").

[88] Even so, AT&T requires payment of an effective rate of $40 per hour for a CLEC to view its conduit records and requires that an AT&T employee be present during manhole inspections performed by the CLEC (at a rate of $95.00 per hour). As indicated in the above text, a requirement that ILEC inspectors be present before a CLEC may perform work in ILEC facilities is unnecessary and can impose on competitors significant and unnecessary delays and – if the ILEC is allowed to impose unreasonable charges – costs. Consequently, while the AT&T approach is preferable to Verizon's denial of access, the Commission should not consider it a model.

F. Conduit Owners' Fees For Searches And Surveys Should Be Capped At Reasonable Levels.

To further protect CLECs from arbitrary and excessive charges for record searches and manhole surveys performed to determine the availability of conduit on a CLECs' behalf, Fibertech proposes a firm cap on charges imposed by conduit owners.[89]

Verizon has previously suggested that if Fibertech is unhappy with Verizon's assessment of estimated charges in advance of survey and make-ready work, Fibertech could subscribe to a different pole attachment agreement with Verizon. The alternate agreement provides set fees, or "unit costs" for pole surveys and make-ready work. Verizon's proposal is misguided because setting unit costs for *pole* surveys and make-ready work would not have restrained excessive charges for *conduit* work and thus would not solve the problems Fibertech has documented. Moreover, Verizon's alternate agreement would have applied to more than simply pole survey and make ready costs, with terms highly unfavorable to Fibertech,[90] and thus would not solve the problems that Fibertech has documented. Finally, Verizon's concession, inherent in its new standard pole attachment agreement, that unit costs are appropriate in some instances undermines any claim that every fee must be based on actual costs.[91]

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[89] *See* Fibertech Petition at 29-30.

[90] Fibertech declined to enter the new pole attachment agreements after Verizon rejected every single change that Fibertech requested be made to the form contract. As a result, if Fibertech had signed the new agreements, it would have been saddled with highly unfavorable terms, including: locking Fibertech into a 180-day time frame for make-ready work, unduly high unit charges of 5 to 7 times the amount that Fibertech charges other companies to perform the same work, and requiring Fibertech to pay charges regardless of whether Fibertech disputed the amount. *See* Stockdale Supp. Decl. ¶ 7.

[91] *See* Joint Opposition of American Electric Power Service Corporation, Duke Energy Corporation, Wisconsin Electric Power Company, WPS Resources Corporation and Xcel Energy Inc. at 24, RM-11303 (filed Jan. 30, 2006) ("AEPSC et. al. Comments").

Qwest has previously claimed that state regulators have already deemed searches and survey charges to be reasonable.[92] Some states, however, have declined to regulate pole and conduit access. The FCC can and should step into this vacuum to provide certainty and ensure that searches and survey charges are reasonable nationwide.

AT&T uses such a standard-fee approach to charge for conduit record searches and manhole surveys in the former Ameritech territory. Specifically, if the CLEC elects not to conduct the records search or the manhole survey itself, AT&T imposes uniform fees of: $400 for a record search of all manholes and conduit associated with a central office (a minimal per-unit charge for a CLEC that installs any significant amount of underground plant);[93] and $400 per manhole for a physical survey of the manhole (AT&T also charges a $200 application fee for each application – an application may cover an unlimited number of manholes).[94] Based on Fibertech's experience with Verizon in Massachusetts where Fibertech monitored Verizon's performance of manhole surveys and revealed that Verizon's costs for record searches and manhole surveys were approximately $188 per manhole, Fibertech recommends a fee (to cover both record searches and manhole surveys) of $200 per manhole.

G. Pole Owners Should Be Required To Provide Detailed Invoice Support For Their Cost-Based Fees.

The Commission should require utilities to provide sufficiently detailed documentation for any charges to competitors based on utility costs of performing

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[92] *See* Comments of Qwest Communications at 8, RM-11303 (filed Jan. 30, 2006) ("Qwest Comments").

[93] *See* Exhibit A, AT&T Form, option "3".

[94] *See* Exhibit A, AT&T Form, option "1".

surveys or make-ready work. Requiring supporting documentation will allow CLECs to better monitor work done by utilities on their behalf and to hold utilities accountable for any charges that exceed reasonable industry levels. Moreover, knowledge of such information up front will enable CLECs to determine the basis for such charges, without having to pay invoices that appear excessive or withhold payment, thus accruing risky outstanding balances, until the owner provides such documentation.

Some pole owners have objected to such a rule as unnecessary. Qwest, for example, argues that state commissions already review billing practices and that any remaining problems can be resolved through the complaint process.[95] But complaint proceedings are ill-suited to resolve these disputes, which would be better avoided by a simple rule requiring support for cost-based fees. Indeed, the limited discovery available through the FCC's complaint process and the near-summary judgment standard for complaint pleading, makes even the pursuit of an FCC complaint difficult without adequate documentation of charges.[96]

Verizon claims that the rule is unnecessary because its "invoices for surveys and make-ready work already provide substantial details."[97] As seen on the attached Verizon bill,[98] however, the lack of detail prevents a competitor from understanding the basis for certain charges. For example, the invoice fails to explain or itemize the charge labeled

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[95] Qwest Comments at 9

[96] Given the Commission's requirement that a formal complaint include a complete and supported statement of facts that, if proven, would warrant relief, *see* 47 C.F.R. § 1.721, and given the limited discovery available in formal complaint proceedings, it would be difficult, if not impossible, to use those proceedings to successfully challenge a vague or incomplete bill.

[97] Verizon Opposition at 10-11.

[98] *See* Fibertech Reply Comments, Exhibit 6, Verizon Invoice.

"Contractor's Services." Fibertech frequently disputes this charge, which is often much higher than Fibertech would pay its own contractors to perform the same work. Such disputes could be avoided if the invoices showed the per unit cost (*e.g.*, cost per foot or cost per hour) for such contractor services. Similarly, the invoice provides no explanation for line item labeled "Additional Charge,"[99] leaving competitors no way of knowing what work or costs are included.

H. The Commission Should Permit CLECs To Use Utility-Approved Contractors to Work In Manholes Without Utility Supervision.

The Commission should also require conduit owners to permit owner-approved contractors to work in manholes on CLECs' behalf without supervision. Utilities typically require utility personnel to supervise CLEC contractors working in manholes at the CLEC's expense.[100] This supervision requirement unnecessarily delays competitive network deployment and pointlessly raises CLEC costs. For example, a CLEC may wish to work 12 hours a day or even through the night to quickly deploy facilities, but an ILEC supervision requirement typically reduces the workday to between 5 and 7 hours. Moreover, conditioning work in a manhole on the presence of a supervisor allows utilities to shut down or delay work on CLEC facilities simply by making the supervisor unavailable. Late notice of unavailability imposes additional costs by forcing CLECs to pay their crews for downtime.

Strategically timed delays can impose severe competitive harm. Verizon once nearly delayed by two months operation of Fibertech's 110-mile Albany, New York backbone network by pulling its supervisor at noon on the last day before Saratoga

[99] *Id.*

[100] Stockdale Decl. ¶ 30.

Springs' eight-week racing-season moratorium on work in city streets.[101] When Verizon pulled its supervisor, Fibertech had only a few hours of work left to perform in a single manhole to complete its network, which in turn would enable Fibertech to offer service in the entire Albany, New York metropolitan area and collect associated revenue.[102] Only after Fibertech's heated objections did Verizon allow completion of the work.[103] As this example demonstrates, forcing CLECs to rely on utility personnel to complete their networks, offer service, and compete necessarily generates opportunities for anticompetitive conduct.

In addition, by charging for the required supervision, a utility imposes significant financial costs on a competitor. To put these costs in perspective, a single Verizon supervisor typically costs Fibertech substantially more than the entire Fibertech crew being supervised (even including vehicle and equipment costs).[104] In upstate New York, for example, Verizon charges $187.50 per hour for an inspector. Fibertech's hourly costs of a splicing crew, including two employees, their vehicle, and all required equipment, is $92 per hour.[105] Thus, pole owners' requirement that their own inspectors be present more than doubles the cost of deploying these advanced network facilities.

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[101] *Id.* ¶ 35.

[102] *Id.*

[103] *Id.*

[104] *Id.* ¶ 36.

[105] *Id.*

Verizon has claimed that its new supervisor requirement is necessary to protect its facilities from damage caused by contractors.[106] To Fibertech's knowledge, however, there is no history of damage to underground facilities caused by CLEC contractors, and Verizon has cited no specific examples in adopting its new policy.[107] Moreover, before Fibertech is entitled to install facilities in Verizon conduit or manholes, it must agree to indemnify Verizon from any and all damages or costs it might suffer as the result of the presence of Fibertech's facilities or any actions by Fibertech or its agents or contractors.[108] To enforce the indemnification obligation, Verizon requires Fibertech to procure and maintain insurance in the amount of at least $1 million per occurrence protecting Verizon from liability for any such damage.[109]

Verizon's own practice demonstrates that costly ILEC supervision is unnecessary. Historically, in New York (and perhaps elsewhere) Verizon permitted licensees to use approved contractors to install innerduct and cable unsupervised. Licensees were charged only for a final inspection.[110] Verizon has since altered this practice and now prohibits contractors hired by Fibertech from working in its manholes without supervision by a Verizon "inspector" for which Fibertech must pay.[111] Although Verizon

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[106] *See* Verizon Opposition at 11-12. *See also* AEPSC et. al. Comments at 23-24; Comments of the United Telecom Council and the Edison Electric Institute at 17, RM-11303 (filed Jan. 30, 2006).

[107] Stockdale Decl. ¶ 32.

[108] *Id.*

[109] *Id.*

[110] The inspection simply ensured that the facilities were placed in the assigned locations (the underground equivalent of standard post-construction inspections of aerial installations). *Id.* ¶ 31 n.8.

[111] The requirement that a supervisor be present does not apply to work *on* a manhole itself, such as drilling the wall to install additional conduit, because that work is done by

prohibits the performance of work outside the "presence" of an inspector, that supervisor is often employed inspecting multiple sites, and the entire cost of the inspector is charged to each site.[112] This double (or more) charging for supervisory time is itself unreasonable, and demonstrates that there is no need for on-site supervision rather than spot inspections.

Further, despite the alleged risk of damage, other facility owners have employed approaches that differ from Verizon's.[113] In 2004, Consolidated Edison allowed (and may still allow) qualified CLEC-hired contractors to work in its telecommunications manholes without the presence of a supervisor.[114] Until 2001, Frontier Telephone of Rochester allowed CLEC's to work in its manholes without supervisors. Empire City Subway historically permitted communications workers for all competitors in New York City to work in its manholes without supervision, and Fibertech has no reason to believe that Empire City's practice has changed.[115] Also, Rochester Gas & Electric allows qualified Fibertech employees to work in its manholes without supervision.[116]

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the ILEC, and ILECs, not surprisingly, do not require a superfluous supervisor for their own work. The supervisor requirement applies only to work within the manhole necessary to install CLEC facilities in the manhole and in conduit accessible from the manhole. *Id.* n.9.

[112] *Id.* ¶ 30.

[113] *See* Qwest Comments at 10 ("Generally, Qwest does not require that make-ready work by an approved contractor be supervised by a Qwest employee contractor.").

[114] Stockdale Decl. ¶ 33.

[115] During the period of initial construction of the cable television plant in New York City, cable television workers were permitted to open and work in Empire City Subway manholes without outside supervision and subject to standard work rules. Work could be shut down if an Empire City Subway inspector came upon the site and discovered work rule violations. Fibertech is unaware that this policy has changed. *Id.* ¶ 33 n.10.

[116] *Id.* ¶ 33.

In fact, the same contractors often perform work for both ILECs and CLECs. Nevertheless, Fibertech understands that Verizon requires additional (and costly) supervision only when a contractor works at a CLEC's behest.[117] The Commission should therefore require utilities to permit utility-approved contractors to work in manholes without utility supervision even if the contractor's customer is a CLEC.

Fibertech and KDL do not object to periodic inspections or even supervision per se, but rather to the attendant dependence on conduit owner supervisors' schedules and the unnecessary conduit-owner charges. Thus, under the proposed rule, owners could retain the option to observe CLEC contractors' work, so long as the CLEC work is in no way contingent upon the presence of the owner's employee and the owner bears any costs. Fibertech and KDL would not object to a requirement that the conduit owner be notified of where and when CLEC contractors would be working.[118]

I. The Commission Should Require ILECs To Provide CLECs With Reasonable Access to Building-Entry Conduit.

Access to existing conduit is critical to a competitor's ability to serve building occupants. Thus, Fibertech and KDL ask the Commission to adopt a rule requiring ILECs, where space is available, (1) to permit CLECs to install cable into building-entry

[117] Notably, Verizon does not reciprocally permit CLECs to supervise (or charge for supervision of) Verizon's employees or contractors working in the presence of the CLECs' facilities, although these workers are presumably at least as likely to cause damage to others' facilities as CLEC contractors. (An ILEC employee or contractor may feel less pressure to avoid damaging another company's facilities due to the fact that his presence in the manhole will be known to no company but the ILEC.) *Id.* ¶ 34 n.11.

[118] Fibertech Petition at 34 n.32.

conduit, (2) to install innerducts and allow CLEC cable to be placed within them, or (3) to allow CLEC cable to be pulled through the interstices among innerducts.[119]

ILECs often deploy fiber strategically to effectively block CLEC access to limited building entry space, thus delaying or precluding deployment of competitive facilities. Entry points into commercial buildings typically are limited to several conduits placed through the foundation wall of the building.[120] Because landlords are extremely reluctant to permit the drilling of additional holes in building foundations to accommodate new conduit, access to the existing conduit is critical to a competitor's ability to serve the building occupants.[121]

ILECs also frequently populate building-entry conduit with cables but no innerduct and then assert that no CLEC cable may occupy the same, undifferentiated space with an ILEC cable.[122] For instance, it is not uncommon for an ILEC – without using innerducts – to place only a few cables in each of several conduits entering a building and claim that the conduits are therefore occupied, effectively denying CLECs access to the substantial remaining conduit space.[123] Similarly, where an entry conduit contains innerduct and the innerduct is fully occupied, ILECs regularly reject CLEC requests for permission to pull their fiber cable through the interstices of the

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[119] The Real Access Alliance has previously stated that neither this rule, nor any of the proposed rules, "implicate the rights of property owners." Comments of the Real Access Alliance at 1-2. In fact, Fibertech's proposal would increase property owners' choices by liberalizing ILEC-owned conduit access and enabling buildings to be served by multiple providers.

[120] Stockdale Decl. ¶ 37.

[121] *Id.*

[122] *Id.* ¶ 38.

[123] *Id.*

innerducts.[124] These ILEC practices prevent competitors from reaching customers in many buildings.[125] Even if a CLEC can persuade a landlord to allow drilling for new conduit through the building foundation, this process, at best, substantially and unnecessarily delays deployment and, in many cases, may render such deployment uneconomic.[126]

The Commission should declare the placing of ILEC cables in building-entry conduit without innerduct and the exclusion of CLEC cables from those conduits where sufficient space remains in the conduit to accommodate the CLEC facilities to be an unlawful reservation of space. ILECs should be required, where space is available, either to: (1) permit a CLEC to install its own cable next to ILEC cable in a building-entry conduit; or (2) install one or more innerducts in the conduit and allow the CLEC to place its cable within such innerduct. Where the ILEC conduit into a building contains innerducts and all the innerducts are occupied, the ILEC should be required to allow a competitor to install its fiber cable into the building by pulling it in between the innerducts. The use of these practices in the field – Verizon's outside plant managers in Albany, New York have permitted Fibertech to install significant amounts of fiber using these techniques[127] – demonstrates the reasonableness of this proposed rule. Indeed, in its comments regarding Fibertech's Petition, Verizon made special note of a recent product (MaxCell®) "developed to facilitate the safe installation of multiple facilities in

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[124] The center space between three innerducts, for example, is ideal. Placement between innerducts does not endanger existing fiber cables within a conduit, of course, because those cables are safely within innerduct. *Id.* ¶ 38 n.12.

[125] *Id.* ¶ 38.

[126] *Id.*

[127] *Id.* ¶ 39.

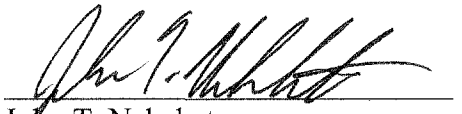
conduit."[128] Not only is this proposed rule free from practical impediments, but it would also create incentives for utilities to deploy cable and innerduct to maximize, rather than minimize, space available in building entry conduit.

[128] Verizon Opposition at 13.

IV. CONCLUSION

Fibertech's and KDL's experiences, and the record in this proceeding, illustrate that the current rules are insufficient to ensure the nondiscriminatory access to poles and conduit mandated by statute and essential to promoting facilities-based broadband deployment. As described above, pole and conduit owners have employed unreasonable practices and imposed unnecessary requirements that cause delays and increase costs for their rivals. The current case-by-case complaint process is too expensive and time consuming to be effective. Accordingly, Fibertech and KDL call upon the Commission to adopt the proposals set forth above. By codifying this set of "best practices" for the industry, the Commission can reduce the need for regulatory oversight, remove barriers to facilities-based entry, and foster competition, without compromising safety or reliability.

Respectfully submitted,



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March 7, 2008

Exhibit A
AT&T Form RC-1 & Form C-1

at&t

Structure Access Request - Ducts and Conduit

Form C-1
10/06

(To be completed by Applicant)

To: AT&T - ☐IL, ☐IN, ☐MI, ☐OH, ☐WI (Check one)
AT&T Structure Access Center (ASAC)
220 Wisconsin Avenue
Waukesha, WI 53186
ASAC@att.com

Customer application number _____

Customer ACNA Code (Required) _____

A payment of $200.00, for administration costs, must accompany this application form.

In accordance with the terms and conditions of the Interconnection Agreement or Structure License Agreement between (Company Name) and AT&T, application is hereby made for a Permit to occupy _____ feet of conduit facilities as indicated on the attached stick map and data sheet (Form C-2) in the municipality of _____. Also indicated on the attached data sheet (Form C-2) are the number and manufacture specifications of communication cables, outside diameters and any locations where it is desired to enter and exit manholes and/or place splices or fiber maintenance loops in AT&T's manholes.

(☐) This authorizes AT&T to perform a make-ready survey whereby AT&T will determine the availability of conduit structure for occupancy, will estimate what make-ready work would be required to prepare the conduit structure for occupancy, and will provide an estimated cost for that make-ready work. Enclosed is a payment of $_____ to cover the cost for AT&T to perform the make-ready survey. The cost for the make-ready survey will be:

$ 200.00 + ($ 400.00 X ____ Manholes = $ _____
(Administration cost) (Unit cost per MH) (Number of manholes) (Total Fixed Charge)

It is understood that this will be the total cost for the Make Ready Survey work unless extraordinary expenses are incurred or changes are requested by Applicant that increase the costs.

(☐) Applicant will perform the make-ready survey (not available in Ohio) and will provide a completed Form C-2 with sufficient details and conduit butterfly drawings for AT&T to perform the make-ready work. Make-ready survey must be completed within 45 days of the date of this application to keep this Request active. All AT&T costs from inspections and site visits during this work will be billed to the Applicant. Applicant will be using AT&T Approved Contractor (Name of contractor doing survey)

MANHOLE ACCESS REQUEST FORM (M-1) MUST BE SUBMITTED WITH THIS OPTION

(☐) Attached are the results from a completed Make Ready Survey. AT&T is requested to provide estimated costs to perform indicated make-ready work. Applicant will be charged a minimum of 2 hours for engineering time.

(☐) To perform make-ready, based on AT&T record check. Enclosed is the A-1 form and payment of the make-ready cost estimate.

By signing this application you agree to follow either the AT&T Structure Access Guidelines and State Tariffs; ICA, or Stand Alone Agreement, whichever one is applicable.

_____
(Company Name of Applicant (not name of Agent))

_____
(Billing address for re-occurring lease bill)

_____
(City, State & Zip code)
(___)___-____ ext. ____
(Telephone Number)

_____
(Office address if different)

_____
(City, State & Zip code)
(___)___-____ext. ____
(Telephone Number)

_____
(Email Address)

_____
(Signed)

_____
(Printed)

_____
(Title)

__/__/____
(Date)

(To be completed by AT&T Only)

ASAC
Application # _____

Project # _____

NOTE: In order to process your request, all necessary drawings and/or maps must be attached when sent via email. If they cannot be sent electronically, please contact the Structure Access Center at either ASAC@att.com or 888-395-2722 for the appropriate Engineer's mailing address. Please do not send request forms directly to the Engineer as it will delay the start of your request.

at&t

Information Access Request - Structure Records

(To be completed by Applicant)

Form RC-1
10/06

To: AT&T: ☐IL, ☐IN, ☐MI, ☐OH, ☐WI (Check one)
Structure Access Center (ASAC)
220 Wisconsin Avenue
Waukesha, WI 53186
ASAC@att.com

Customer application #_____

Customer ACNA Code (Required) _____

In accordance with the terms and conditions of the Interconnection Agreement or Structure License Agreement between AT&T and _____ application is hereby made to obtain information from AT&T Structure Records in the municipality of (City).

Applicant requests AT&T proceed as indicated:

☐ Please arrange to allow our representative to view the appropriate Structure Records for the area indicated on the enclosed map and data sheets. A deposit of $ is enclosed ($80 per hour X number of hours requested X 50%) Minimum is two hours.

☐ Please perform a Route Record Check on the route as indicated on the attached stick maps or drawings. A Route Record Check is a review of AT&T conduit and cable records (no field visits) of the conduit and manholes indicated on the attached stick map and data sheets to determine possible availability of duct space from the records. A deposit of $ ($400.00 per Wire Center) is included to cover the record preparation.

For all deposits it is understood that all charges shall be based on actual cost including overhead. If these charges differ from the deposit amount, a bill will be issued to collect any additional charges or a refund will be made if the deposit exceeds charges.

NOTE: In order to process your request, all necessary drawings and/or maps must be attached when sent via email. If they cannot be sent electronically, please contact the Structure Access Center at either ASAC@att.com or 888-395-2722 for the appropriate Engineer's mailing address. Please do not send request forms directly to the Engineer as it will delay the start of your request.

By signing this application you agree to follow either the AT&T Structure Access Guidelines and State Tariffs; ICA, or Stand Alone Agreement, whichever one is applicable.

	If Applicant information is same as Customer leave blank.
_____ (Applicant Contact Person)	
_____ (Company Name of Applicant)	_____ (Customer Contact Person)
_____ (Applicant Address)	_____ (Customer Company Name of Applicant)
_____ (City, State & Zip code)	_____ (Billing Address)
( ) - ext. _____ (Telephone Number)	_____ (City, State & Zip code)
_____ (E-mail Address)	( ) - ext. _____ (Telephone Number)
_____ (Signed) _____ (Date)	_____ (E-mail Address)